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MEMORANDUM

DATE: For the March 14, 2017 Commission Meeting

TO: Members, Wisconsin Elections Commission

FROM: Michael Haas
Interim Administrator

Prepared and Presented by:
Nathan W. Judnic
Legal Counsel

SUBJECT: Administrative Rules Update and Planning

This memorandum is intended to provide the Commission with a recommended plan for accomplishing promulgation of administrative rules that are directed and/or authorized by state statute. Sustained progress on administrative rulemaking is not a new challenge to the state agencies overseeing elections. Staff members of the former Government Accountability Board (“G.A.B.”) assigned to rulemaking encountered the same challenges as the staff of the Commission have encountered: 1) prioritization of rulemaking above other pressing tasks, 2) dedication of uninterrupted blocks of time to administrative rulemaking tasks, and 3) allocating the resources necessary to make substantial progress on navigating the often tedious administrative steps necessary to get a final rule published. These challenges still exist, but Commission staff seeks to make significant progress on administrative rulemaking in calendar year 2017, and will continue to provide progress reports at each Commission meeting.

Commission staff has assigned a priority label to each proposed rule, taking into account many factors, some of which include: the need or desire to have a rule in place for enforcement purposes, the stage at which a particular rule is currently in, whether the Commission has established policies, manuals or procedures that already address the topic, and whether legislation in lieu of rulemaking is possible to address the topic or procedure. The memorandum lists the “High” priority rules first, followed by rules that the staff believes are “Medium” or “Low” priority taking into account the factors listed above.

I. Status of Proposed Rulemaking – Assigned Priority, Background and Next Steps

1) Proposed Rule: Election Observers – Wis. Admn. Code Ch. EL 4

Priority: High

Background: The administrative rule related to election observers has had a long and tumultuous past. The short version of this history is that the G.A.B. originally approved an order to repeal and recreate Chapter GAB 4 in December 2010. An emergency rule was in place, but subsequently expired. By mid-2013, the G.A.B. approved a final rule to be submitted to the Legislature. The Legislature raised some objections to minor provisions in the rule and chose not to act on the rule within the required 4-year period, so a final permanent rule was never promulgated – essentially requiring the agency to start from scratch and begin the process again. In the interim, the G.A.B. and the Commission have advised observer groups, the public and the Legislature that the rules contained in the proposed Chapter GAB 4 is the agency’s interpretation of how Wis. Stat. § 7.41 must be interpreted in order to maintain order at polling locations. While these rules have been generally accepted as the rules governing the conduct of observers, codification of new Chapter EL 4 should be the Commission’s top rulemaking priority, to provide a more solid legal basis for enforcing the rules which have become the accepted practice.

At the January 13, 2015 G.A.B. meeting, the Board authorized staff to draft a Statement of Scope to be submitted to the Governor’s office to start the promulgation again. On May 18, 2015, a Statement of Scope was submitted to the Governor’s Office for approval. Leading up to the Commission’s August 30, 2016 meeting, staff had conversations with the Governor’s legal staff regarding pending Statements of Scope. The Governor’s legal staff requested that Statements of Scope previously submitted by the G.A.B. be resubmitted as Elections Commission rules (“Chapter EL ___” vs. “Chapter GAB ___”). The Commission authorized staff to proceed with resubmitting those statements to the Governor.

Statement of Scope: An updated Statement of Scope for Chapter EL 4 has been drafted and will be resubmitted to the Governor’s Office per the Commission’s August 30, 2016 authorization.

Next Steps: Once the Commission receives approval of the Statement of Scope from the Governor’s Office, it is sent to the Legislative Reference Bureau for publication in the Administrative Register for at least 10 days.

2) **Proposed Rule: Procedure – Wis. Admn. Code Ch. EL 6**

Priority: High

Background: During the transition planning from the G.A.B. to the Elections Commission, two chapters of the G.A.B. code were transferred to both the Elections Commission and the Ethics Commission in their entirety. Chapter 6 was one of these chapters because it relates to procedures that neither Commission wanted to ‘lose’ upon transfer. There are certain portions of Chapter EL 6 that no longer apply to the agency, therefore the rule needs to be revised to remove sections that now only apply to the subject matter covered by the Ethics Commission. This rule is one step further than the previous rules reviewed in this memorandum, in that the Governor has approved the Statement of Scope and the Legislative Reference Bureau has published the Statement of Scope in the Register (SS 073-16). The Commission then approved the Statement of Scope at the August 30, 2016 meeting.

Next Steps: Commission staff will draft the proposed amendments to the current rule to remove the sections that are no longer applicable to the Commission, draft an analysis of the proposed amendments including instructions on how public comments on the rule can be submitted for consideration. The Statement of Scope was submitted and approved as an emergency rule and

permanent rule therefore the Commission staff will act to get the emergency rule in place as soon as possible.

3) Proposed Rule: Practice and Procedure – Wis. Admn. Code Ch. EL 21

Priority: High

Background: During the transition planning from the G.A.B. to the Elections Commission, two chapters of the G.A.B. code were transferred to both the Elections Commission and the Ethics Commission in their entirety. Chapter 21 was one of these chapters because it relates to practice and procedures that neither Commission wanted to ‘lose’ upon transfer. There is certain language in Chapter EL 21 that no longer apply to the agency, therefore the rule needs to be revised to remove language that now only applies to the subject matter covered by the Ethics Commission. This rule is one step further than the previous rules reviewed in this memorandum, in that the Governor has approved the Statement of Scope and the Legislative Reference Bureau has published the Statement of Scope in the Register (SS 073-16). The Commission then approved the Statement of Scope at the August 30, 2016 meeting.

Next Steps: Commission staff will draft the proposed amendments to the current rule to remove the sections that are no longer applicable to the Commission, draft an analysis of the proposed amendments including instructions on how public comments on the rule can be submitted for consideration. The Statement of Scope was submitted and approved as an emergency rule and permanent rule therefore the Commission staff will act to get the emergency rule in place as soon as possible.

4) Proposed Rule: Ballot and Electronic Voting System Security – Wis. Admn. Code Ch. EL 5

Priority: High

Background: Technological advances in voting equipment and the security standards associated with new equipment requires promulgation of Wis. Admn. Code Ch. EL 5. The proposed rule will outline ballot security requirements, standards for determining the validity of votes cast with electronic voting equipment, and provisions for administering statutory requirements for electronic voting machines, electronic voting systems and any other voting apparatus which may be introduced into this State for use at elections. Proposed Wis. Admn. Code Ch. EL 5 overlaps with some of the requirements contained in Wis. Admn. Code Ch. EL 7 (Approval of Electronic Voting Equipment). Chs. EL 5 and 7 will also outline rules for the security, review and verification of software components used with each electronic voting system approved by the commission as required by Wis. Stat. § 5.905 (Software components). Between Chs. EL 5 and 7, Commission staff intend to address both of these important areas of voting equipment security and approval for use in Wisconsin.

Statement of Scope: A draft Statement of Scope for a “GAB” rule has been drafted, but needs to be reexamined and redrafted as an “EL” rule.

Next Steps: Commission staff requests authorization to draft a Statement of Scope for Ch. EL 5 and submit it to the Governor’s Office for approval. The Statement of Scope will be consistent

with the approval process provisions for electronic voting equipment contained in Wis. Admn. Code Ch. EL 7.

5) Proposed Rule: Approval of Electronic Voting Equipment – Wis. Admn. Code Ch. EL 7

Priority: High

Background: As technology and methods for testing and approval of voting equipment evolves, so too must the rules that govern that process. Amendments to Wis. Admn. Code Ch. EL 7 are needed to keep up with technological advances. The original rules were first promulgated in 2000 and much has changed since that time. In 2015, the Governor’s Office approved a Statement of Scope to amend the “GAB” version of Ch. 7 (SS 046-15). Since this statement was approved, Commission staff has internally discussed how to best address standards for both the approval of electronic voting systems and ballot and electronic voting system security and how to address the overlap in these concepts. Proposed Wis. Admn. Code Ch. EL 5 (Ballot and Electronic Voting System Security) overlaps with some of the requirements contained in Wis. Admn. Code Ch. EL 7. Chs. EL 5 and 7 will also outline rules for the security, review and verification of software components used with each electronic voting system approved by the commission as required by Wis. Stat. § 5.905(3) (Software components). Between Chs. EL 5 and 7, Commission staff intend to address both of these important areas of voting equipment security and approval for use in Wisconsin.

Statement of Scope: Statement of Scope has been approved by the Governor’s Office.

Next Steps: Commission staff will begin drafting the rule amendments to ensure that new technology and approval processes are accounted for and are consistent with the security measures outlined in proposed Wis. Admn. Code Ch. EL 5.

6) Proposed Rule: Absentee Ballot Information Subscription Service and Fee Schedule – Wis. Admn. Code § EL 3.60

Priority: Medium

Background: 2015 Wisconsin Act 261 specifically directed the G.A.B. to establish a subscription service whereby a person could electronically access absentee ballot information provided under Wis. Stat. § 6.33(5)(a), including semiweekly updates of such information. The Act further required the G.A.B. to establish by rule the fee schedule for obtaining access to the absentee ballot information through the subscription service. The original Statement of Scope that was submitted to the Governor’s Office was for both an emergency and permanent rule. The G.A.B. authorized the staff on April 26, 2016 to draft and submit a Statement of Scope for this rule. The need and urgency for an emergency rule is no longer needed, therefore the Commission staff resubmitted the updated Statement of Scope for a permanent rule only. The Commission currently utilizes the BadgerVoters application to facilitate requests for absentee ballot data. Because the absentee data is housed within the WisVote system, the same price structure for data files is currently in place. The system allows for a yearly subscription and allows the user to choose how often they want to be notified of updated absentee data.

The Governor's legal staff requested that Statements of Scope previously submitted by the G.A.B. be resubmitted as Elections Commission rules ("Chapter EL ____" vs. "Chapter GAB ____"). The Commission authorized staff to proceed with resubmitting those rules as requested.

Statement of Scope: An updated Statement of Scope for Wis. Admn. Code § EL 3.60 has drafted and will be resubmitted to the Governor's Office per the Commission's August 30, 2016 authorization.

Next Steps: Once the Commission receives approval of the Statement of Scope from the Governor's Office, it is sent to the Legislative Reference Bureau for publication in the Administrative Register for at least 10 days.

7) Proposed Rule: Training for Election Inspectors and Special Voting Deputies – Wis. Admn. Code Ch. EL 13

Priority: Medium

Background: Wis. Stat. § 7.315(1)(a) directs the Commission to promulgate rules that prescribe the contents of training that municipal clerks must provide to election inspectors and special voting deputies. The Commission currently has comprehensive manuals that cover election administration, municipal clerk duties, election day processes, voting in residential care facilities conducted by special voting deputies and counting votes, among others. This rule is intended to codify the subjects and contents contained in each of these manuals, and prescribe the training from these manuals that municipal clerks must provide to inspectors and SVDs. As the requirements and laws are constantly in flux, it is difficult to envision a rule that will provide more than broad topics and concepts that must be included in a basic training curriculum. The G.A.B. approved drafting a Statement of Scope for this rule on January 13, 2015.

Statement of Scope: Scope Statement SS 045-15 has already been approved, but it is approved as promulgating a GAB rule.

Next Steps: Commission staff recommends resubmitting the current approved Statement of Scope as an "EL" rule to the Governor's Office to be reapproved.

8) Proposed Rule: Complaint Procedure – Amendments to Wis. Admn. Code Ch. 20

Priority: Medium

Background: Current Wis. Admn. Code Ch. EL 20 which relates to complaint procedures has been superseded by Wis. Stat. § 5.05(2m), with the exception of complaints filed against local election officials under Wis. Stat. § 5.06. Ch. EL 20 needs to be amended to more specifically address complaints filed under Wis. Stat. § 5.06. This rule was placed with the Elections Commission during the transition planning. Some remnants of the procedures used to investigate ethics and campaign finance violations still exist in Ch. EL 20 that should be removed. While the rule is workable, the Commission staff believes revisions could be made to more efficiently process complaints filed under Wis. Stat. § 5.06.

Statement of Scope: A Statement of Scope to make the necessary revisions and amendments to ch. 20 was drafted as a "GAB" rule. No statement has been drafted as an "EL" rule on this topic.

Next Steps: Commission staff requests authorization to draft a Statement of Scope for Ch. EL 20 and submit it to the Governor’s Office for approval.

9) **Proposed Rule: Responsibilities of Clerks Maintaining Records in the Statewide Voter Registration System – Additions to Wis. Admn. Code Ch. EL 12**

Priority: Medium

Background: The Legislative Audit Bureau (LAB) conducted audits of the State Elections Board in 2007 ([Report 07-16](#)) and the G.A.B. in 2014 ([Report 14-14](#))¹. The 2007 audit generated a recommendation that the agency promulgate rules to clarify the responsibilities of local election officials in registering individuals to vote. Current Wis. Admn. Code Ch. 3, titled “Voter Registration” does provide rules for clerks registering individuals to vote – contents of the form, information that must be obtained from election day registrants, etc. The 2014 audit generated a recommendation that the agency promulgate rules that formalize the procedures clerks use to maintain voter registration records, including inactivating the records of individuals who become ineligible to vote and mailing letters to notify these individuals that their records have been inactivated. Attempts to promulgate rules consistent with the recommendations contained in the 2014 audit have been delayed by litigation and statutory changes in this area of the law. Although not formalized in a rule, the former G.A.B. staff and current Commission staff have provided detailed guidance and instructions to local election officials on the procedures for inactivating records of ineligible voters and providing the appropriate notices. The Commission staff believes certain amendments to current Wis. Admn. Code Ch. EL 12 can be made to clarify the role of municipal clerks in voter registration and use of the statewide system, consistent with the LAB recommendations.

Statement of Scope: Commission staff began drafting a Statement of Scope for the “GAB” rule. Work has not commenced updating the statement as an “EL” rule.

Next Steps: Commission staff requests authorization to draft a Statement of Scope for amendments to Ch. EL 12 and submit it to the Governor’s Office for approval.

10) **Proposed Rule: Curbside Voting – Wis. Admn. Code § EL 6.06**

Priority: Low – detailed procedures for curbside voting already exist in Commission manuals

Background: By statute, any elector, who as a result of a disability is unable to enter the polling place, may elect to receive a ballot at the entrance of a polling place. Wis. Stat. § 6.82(1). Electors may receive assistance in marking a ballot, if required, from an election inspector or from any other person of the voter’s choice, with certain restrictions. Wis. Stat. § 6.82(2). Based on these statutes, the former G.A.B. staff established procedures for local election officials to use when a curbside voting situation arose at the polling location. The Elections Commission staff have continued to advise, when asked, using the same procedures established by the G.A.B. Promulgation of a rule will codify the current procedures and allow the Legislature to review the

¹ A follow-up audit was also conducted in 2015 focused solely on complaints considered by the Government Accountability Board, after legislation was passed allowing the Legislative Audit Bureau access to this confidential information. [Report 15-13](#)

Commission's procedures. The G.A.B. authorized the staff on April 29, 2015 to draft and submit a Statement of Scope for this rule.

The Governor's legal staff requested that Statements of Scope previously submitted by the G.A.B. be resubmitted as Elections Commission rules ("Chapter EL ____" vs. "Chapter GAB ____"). The Commission authorized staff to proceed with resubmitting those rules as requested.

Statement of Scope: An updated Statement of Scope for Wis. Admn. Code § EL 6.06 has been drafted and will be resubmitted to the Governor's Office per the Commission's August 30, 2016 authorization.

Next Steps: Once the Commission receives approval of the Statement of Scope from the Governor's Office, it is sent to the Legislative Reference Bureau for publication in the Administrative Register for at least 10 days.

11) Proposed Rule: Filing Documents by Fax or Electronic Methods – Wis. Admn. Code § EL 6.04

Priority: Low

Background: Chapter EL 6 addresses miscellaneous procedures used by the former G.A.B. and now the Commission. One specific section that should be updated is § EL 6.04 which relates to the process that should be used when filing documents by FAX. This rule is outdated and should be updated to reflect newer technologies such as email. The Commission already allows individuals to file documents by email if they are true and correct copies of the original hard copy. This rule would amend this section to include procedures for filing documents by email, as well as clarify the deadline for receiving a signed original (if required) of documents filed electronically.

Statement of Scope: A Statement of Scope was drafted to promulgate this rule as a "GAB" rule in 2015. No updated "EL" rule has been drafted at this point.

Next Steps: While a low priority given other rules that need to be drafted, this rule could be drafted pretty quickly and have a very low probability of being controversial. The Commission staff requests authorization to redraft a Statement of Scope to amend current Chapter EL § 6.04 and submit to the Governor's Office for approval.

12) Proposed Rule: Amend Wis. Admn. Code EL Ch. 3 to Remove Special Registration Deputy References

Priority: Low - due to pending litigation surrounding special registration deputies, and explanatory notes currently present in the online version of this section.

Background: With Online Voter Registration successfully going live in January 2017, Wis. Stat. § 6.26 has been repealed. Special registration deputies are no longer authorized or used in Wisconsin, therefore Wis. Admn. Code §§ EL 3.10, 3.11 and 3.12 will need to be repealed, and other sections amended to remove references to special registration deputies. The Code Editor has placed a note following §§ EL 3.10, 3.11 and 3.12 which states that these sections are unenforceable as a result of the repeal of Wis. Stat. § 6.26 and that they will be repealed in a

future rulemaking. The elimination of special registration deputies is also part of the *One Wisconsin* litigation that is currently pending before the 7th Circuit Court of Appeals.

Statement of Scope: The Commission has not authorized the drafting of a Statement of Scope for this rulemaking. The Commission staff has not requested authorization to begin drafting a statement.

Next Steps: Commission staff recommends placing any rulemaking to repeal these sections on hold until the *One Wisconsin* case has been resolved. The editorial notes that follow the online version of these code sections sufficiently provide a reader notice that these sections are not enforceable.

II. Current Proposed Rulemaking That May Be Accomplished by Legislation

The Commission staff has been in contact with legislative staff of the appropriate standing committee in the Assembly regarding rulemaking topics currently on the Commission's plate which may be good candidates for legislation, thus removing the requirement to promulgate a rule. Commission staff identified the five proposed rulemaking topics/amendments that they believe are the best candidates. This information has been provided to the legislative staff and there is a possibility that legislation could be introduced in lieu of promulgating rules in these areas. Given this potential, Commission staff would recommend categorizing the following proposed rules as "Low Priority" to allow potential legislation to address these topic areas to be drafted and considered.

1) Proposed Rule: Election Notices – Wis. Admn. Code Ch. EL 8

Priority: Low

Background: Wis. Stat. § 10.01(1) directs the Commission to prescribe the form of the various election notices contained in that chapter to ensure they are uniform. "To accomplish this purpose, the commission shall make rules and draft whatever forms it considers necessary." Wis. Stat. § 10.01(1). This rule will codify the information provided on the notices, and afford the Legislature the opportunity to comment on the proposed content and form of the required election notices under Wis. Stat. Ch. 10. On January 13, 2015, the former G.A.B. authorized staff to draft and submit a Statement of Scope on this rule.

The Governor's legal staff requested that Statements of Scope previously submitted by the G.A.B. be resubmitted as Elections Commission rules ("Chapter EL ____" vs. "Chapter GAB ____"). The Commission authorized staff to proceed with resubmitting those rules as requested.

Statement of Scope: A Statement of Scope for the "EL" version has been drafted to codify the information provided on election notices.

Next Steps: Staff recommends placing this proposed rule on hold until it is clear whether legislation will be introduced in lieu of rulemaking on this topic.

2) Proposed Rule: Electronic Proof of Residence for Voter Registration – Wis. Admn. Code § EL 3.015

Priority: Low

Background: Based on current Commission policy (former policy of the G.A.B.) a voter wishing to register to vote may present either an acceptable hard-copy document or an electronic version of an acceptable document that establishes proof of residency. The administrative rule is intended to codify this important Commission policy and identify the specific types of electronic identifying documents or records listed in Wis. Stat. § 6.34(3) that are acceptable. On April 29, 2015, the former G.A.B. authorized staff to draft and submit a Statement of Scope for this rule.

The Governor's legal staff requested that Statements of Scope previously submitted by the G.A.B. be resubmitted as Elections Commission rules ("Chapter EL ____" vs. "Chapter GAB ____"). The Commission authorized staff to proceed with resubmitting those rules as requested.

Statement of Scope: A Statement of Scope for the "EL" version has been drafted to codify this policy.

Next Steps: Staff recommends placing this proposed rule on hold until it is clear whether legislation will be introduced in lieu of rulemaking on this topic.

3) **Proposed Rule: Absentee Voting-Procedure for Overseas Voting – Wis. Admn. Code Ch. 17 (previously submitted as Ch. EL 13)**

Priority: Low

Background: This rule covers a very rare absentee voting scenario, nonetheless, on April 29, 2015, the former G.A.B. authorized the staff to submit a Statement of Scope for this rule based on an existing policy established by the G.A.B. The policy allows an overseas voter to have a U.S. citizen witness their absentee voting process via an internet video service, such as Skype or Facetime, if they are unable to locate a U.S. citizen to have the process witnessed in-person.

The Governor's legal staff requested that Statements of Scope previously submitted by the G.A.B. be resubmitted as Elections Commission rules ("Chapter EL ____" vs. "Chapter GAB ____"). The Commission authorized staff to proceed with resubmitting those rules as requested.

Statement of Scope: The previous version of the Statement of Scope inadvertently overlapped with proposed Chapter EL 13 – so a resubmission to the Governor's Office will properly create this rule under Chapter EL 17 – Absentee Voting, if legislation is not initiated.

Next Steps: Staff recommends placing this proposed rule on hold until it is clear whether legislation will be introduced in lieu of rulemaking on this topic.

4) **Proposed Rule: Requiring provision of certain information by election-day registration applicants – Amendment to Wis. Stat. Admn. Code § EL 3.04(2)**

Priority: Low

Background: Current Wis. Admn. Code § 3.04(2) allows for a provisional ballot to be issued to a voter that is unable or unwilling to provide their DOT issued driver license or DOT issued state ID card number on the registration application. The rule allows the individual issued a provisional ballot under this category to provide the number to the clerk no later than 4:00pm on

the day after the election. Individuals issued a provisional ballot in all other categories must provide the required piece of information to the clerk by 4:00pm by the Friday after the election. The amendment to this rule corrects and standardizes the date upon which a provisional voter must provide information to the clerk for their ballot to be counted. The G.A.B. approved drafting a Statement of Scope for this rule on June 18, 2015.

Statement of Scope: A Statement of Scope has been drafted to amend current Wis. Admn. Code § EL 3.04(2).

Next Steps: Staff recommends placing this proposed rule on hold until it is clear whether legislation will be introduced in lieu of rulemaking on this topic.

5) **Proposed Rule: Definition of “Same Grounds” – Wis. Admn. Code § EL 6.07**

Priority: Low

Background: The phrase “same grounds” is used in Wis. Stat. § 6.875(3)(b), and no corresponding definition is provided to inform clerks as to what this phrase could encompass. “If a retirement home that is not a qualified retirement home is located within a municipality on the *same grounds* as one or more residential care facilities to which the municipal clerk or board of election commissioners of the municipality dispatches special voting deputies to conduct voting at an election, the municipal clerk or board of election commissioners shall obtain from the management of the retirement home the names and addresses of the occupants of the home.” Wis. Stat. § 6.875(3)(b). An amendment to Wis. Admn. Code § EL 6.07 would specifically define what is meant by “same grounds” to assist local clerks in applying this statutory section properly.

Statement of Scope: A Statement of Scope for the “GAB” rule was drafted, but an “EL” version has not yet been drafted by the Commission staff.

Next Steps: Staff recommends placing this proposed rule on hold until it is clear whether legislation will be introduced to define “same grounds” in this context in lieu of rulemaking.

III. Staff Recommendations and Future Commission Updates

Commission staff seeks general approval from the Commission on the items noted above seeking specific action. Commission staff seeks general approval on the approach and plan to promulgate the rules identified above. Commission staff intends to provide progress updates on administrative rules at each regular meeting of the Commission.